IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03/09/2002

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THE HONOURABLE MR.JUSTICE N.V.BALASUBRAMANIAN
and
THE HONOURABLE MR.JUSTICE C.NAGAPPAN

C.M.A.(PD).No.15 of 2002
and
C.M.P.No.8480 of 2002

M.Ravi. ..... Appellant

-Vs-

R.Vasanthakumari. ..... Respondent

C.M.A. filed against the order dated 10.6.2002 in I.A.No.466 of 200 2 in O.S.No.256 of 2002 on the file of the Subordinate Judge's Court, Karur.

!For appellant :: Mr.P.Valliappan for
M/s.Sarvabhauman Associates.

^For respondent:: Mr.N.Damodaran.

:JUDGMENT

N.V.BALASUBRAMANIAN,J.

This appeal is filed against the order dated 10.6.2002 in I.A.No.46 6 of 2002 in O.S.No.256 of 2002 on the file of the Sub Court, Karur.

2. The respondent herein instituted the suit in O.S.No.256 of 2002 against the appellant/second defendant and 10 others for recovery of a sum of Rs.59,66,100/- along with interest and costs. The parties are referred to as shown in the plai aintiff, who is the respondent herein, filed a petition under Order 38, Rule 5 of the Code of Civil Procedure against the second defendant/the appellant herein to direct the second defendant to furnish sufficient security for the suit claim within the time that may be specified by the Court and in default, the petition mentioned property may be ordered to be attached before judgment by the Court. The Subordinate Judge's Court, Karur, by order dated 30.5.2002, directed the second defendant to furnish security for the suit amount on or before 10.6.2002 and ordered notice. The second defendant did not challenge the order directing him to furnish security. The second defendant has also not filed any counter affidavit denying the averments made in the affidavit in support of the

petition, I.A.No.466 of 2002. On the other hand, the second defendant filed vakalat and also furnished security. Learned Subordinate Judge found that three properties were given as security and the value of one of the properties as per the sale deed was Rs.1,68,100 /- and the value given by the Village Administrative Officer in his valuation certificate was Rs.72,00,000/-. He was of the view that the value given by the Village Administrative Officer was on the high side. Learned Subordinate Judge found that the perusal of the encumbrance certificate showed that the name of the second defendant was not shown as the owner and other two sale deeds were executed in Kerala. In the circumstances, he held that the security was not furnished to the suit amount and hence, he ordered attachment of the petition mentioned property. It is against this order, the present appeal has been preferred.

3. Heard Mr.P.Valliappan, learned counsel for the appellant and Mr.N.Damodaran, learned counsel for the respondent. Mr.P.Valliappan, learned counsel for the petitioner submitted that the learned Subordinate Judge was not correct in passing the order of attachment. He also submitted that the order directing the second defendant to furnish security is not sustainable as the conditions prescribed under Order 38, Rule 5 of the Code of Civil Procedure are not satisfied. In support of his submissions, learned counsel relied upon number of decisions.
4. Mr.N.Damodaran, learned counsel for the respondent, on the other hand, submitted that the second defendant has not chosen to file any counter affidavit denying the averments made in the affidavit filed in support of the petition and in the absence of any denial, learned Subordinate Judge was perfectly justified in ordering attachment.

5. In our view, it is not necessary to go into the larger question as we find from the order under challenge in the appeal that the appellant herein has readily offered the properties as security. We also find from the perusal of the order of the learned Subordinate Judge that the learned Subordinate Judge has not conducted any independent enquiry as to the valuation of the property offered as security, but rejected the security only on the basis that the sale consideration as shown in the deed of sale came to Rs.1,68,100/- only. It is stated that the sale deed was executed in the year 1977 and it is the common knowledge that there is a steady increase in the value of immovable properties from the year 1977. We are of the view that before rejecting the security offered by the second defendant, learned Subordinate Judge should have conducted an enquiry as to the sufficiency of the security offered and for that purpose, he should have ascertained the market value of the property offered as security and on the basis of enquiry, he should have decided the question whether the security offered would be sufficient to cover the amount claimed in the plaint. We are also of the opinion that the procedure adopted by the learned Subordinate Judge in straightaway attaching the property without satisfying himself as to the value of the property offered as security is not correct. The second defendant had offered three properties as security in compliance with the orders of learned Subordinate Judge and learned Subordinate Judge should have tested the value of the security and if the security offered was found to be insufficient to cover the amount claimed in the plaint, he should have given an opportunity to the second defendant to make good the deficiency. The procedure adopted by

the learned Subordinate Judge in straightway rejecting the security and attaching the property is not correct. Accordingly, we are unable to uphold the order of the learned Subordinate Judge. Hence, we set aside the order of the learned Subordinate Judge and direct him to conduct a de novo enquiry regarding the value of the property offered as security and determine whether the security offered is sufficient for the amount claimed in the plaint. In the view we have taken, it is not necessary to consider the decisions referred to by the learned counsel for the appellant.

6. Learned counsel for the respondent brought to our attention the affidavit filed by the second defendant before the learned Subordinate Judge wherein he has given an undertaking not to create any encumbrance over the property mentioned in the schedule to I.A.No.466 of 20 02 till an order is obtained from the trial Court. Learned counsel for the appellant fairly submits that the undertaking given by the appellant/ second defendant would operate till the disposal of I.A. No.466 of 2002. Accordingly, the undertaking given by learned counsel for the appellant/second defendant not to alienate the property mentioned in the petition till the disposal of I.A.No.466 of 2002 is recorded. The Civil Miscellaneous Appeal is allowed with the above direction. No costs. Consequently, C.M.P.No.8480 of 2002 is closed.

(N.V.B.,J.)(C.N.,J.)

Index: Yes
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To

The Subordinate Judge,
Karur.

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